

## FROM THE SHOULDERS OF GIANTS©

Hon. Larry M. Boyle

Remember the old saying, “*I’ve got some good news and some bad news - which do you want first?*” In the paragraphs that follow I will share some of both as relates to the current state of the legal profession and how we are viewed by its critics.

As part of a three year research project, I have spent an evening or two every week in the public library and an occasional Saturday morning at one of the commercial bookstores reading the academic and commercial literature concerning lawyers and the legal profession. Having recently completed this extensive study, I have concluded that the legal profession is under more scrutiny and greater condemnation than at any time in our nation’s history. In my view, the dialogue and public discourse needs to be carefully weighed and, in light of the many voices either shouting at or calling out to the profession from many different directions, we need to listen.

Albert Einstein, the 1921 Nobel Prize recipient for physics, is reported to have said: “*If I have seen further than others, it is because I have stood on the shoulders of giants.*” While the same statement has also been attributed to British mathematician Isaac Newton, it has also been suggested it may have been inspired by the stained glass windows of the Cathedral Notre Dame Chartres which depict New Testament figures standing on the shoulders of the Old Testament writers.

Regardless of its origin, the visual imagery of standing on the shoulders of the great masters to gain a better view or see further is applicable to us in the legal profession. We, the lawyers and judges of the 21<sup>st</sup> Century, do indeed stand on the shoulders of giants, and having been fortunate enough to inherit that privileged vantage point, we must do something about what we see.

Looking back on my 60 years, it seems I have always been at least collaterally involved with lawyers. Following a tour with the FBI in the late 1930's and early 1940's, my father went to work as an investigator and claims agent for the railroad. Frequent topics of discussion around the family dinner table were about cases brought against the railroad and lawyers with whom he worked negotiating and settling claims. Although I did not fully understand at that time the legalese he wove into those great lessons around the dinner table, I knew by the way he spoke and the tone of his voice that he respected the lawyers whose names he mentioned. Years later I married the daughter of a respected lawyer who continued my informal legal education even before I started law school. In addition to my own personal experiences in the law, my oldest son is a taxation and business attorney in Seattle, another son is starting law school this Fall, my brother is a successful lawyer in Dallas, Texas and two brothers-in-law enjoy national reputations in water and natural resources law. Through all of this experience, I have developed a deep respect for lawyers and the legal profession.

I will start with the good news. Succinctly stated, the vast majority of lawyers are honest, competent and decent men and women providing quality legal services to their clients in a timely manner and at a fair price. There is much of a positive nature to the legal profession that never hits the front page. Good news doesn't make the evening news. There are honest, competent lawyers in every community. These men and women serve their clients and the organized bar during the day, then give of themselves by contributing countless hours as directors of the local school board and the YMCA, coaching kids in a soccer league, contributing to their churches, speaking to school and youth groups, teaching adult education classes, providing pro bono legal service, and otherwise serving their communities in a myriad of ways.

Notwithstanding all the good that lawyers do on an individual basis, there is no question that the legal profession itself has taken some heavy blows in recent years.

A few short years ago, an intimate relationship between a lawyer-President, a graduate of one of our finest law schools, and a young intern leading to perjury charges, quibbling over the definition of the word "*is*" in a deposition, subsequent impeachment proceedings, a deal cut at the eleventh hour, and finally suspension of his license to practice law, certainly did not help the image of the legal profession. Add to former President Clinton's legal woes, former Vice-President Spiro Agnew was also stripped of his license to practice law, and his boss, Richard Nixon, resigned this nation's highest office in the shadow of pending impeachment. Sadly, all were lawyers at one time.

More recently, criticism of the legal profession has even come directly from the Oval Office, when in the 2003 State of the Union Address, President Bush raised the issue of frivolous lawsuits.<sup>1</sup>

Criticism of the legal profession comes from a wide variety of sources: the print and broadcast news media, web-sites such as [Overlawyered.com](http://Overlawyered.com), current and former members of the judiciary, law school professors, dissatisfied clients, radio and television talk shows, and from lawyers themselves. The topics usually include methods and levels of lawyers' compensation, ethics, frivolous lawsuits, frivolous defenses of meritorious claims, what appear to be huge but unsupportable verdicts, unexplainable convictions or acquittals, and so on. Indeed, there is much to talk about concerning the state of the legal profession and it is being printed, spoken and discussed everywhere from the President's State of the Union address to the neighborhood barbershop.

Contained in the literature authored by credible critics are serious and legitimate calls for reform of the legal profession, some of it self-described as radical. Several of the tomes, written by intelligent and informed commentators, make legitimate, serious proposals for change.

On the other hand, the shelves of the public libraries and commercial bookstores are well-stocked with light reading, yet commercially successful, publications about the condition and direction of the legal profession. This genre of publication has topics ranging from alternative careers for lawyers to books intended to help the general public

find the best lawyer for their needs. “*How-to*” and “*Law for Dummies*” type of books proliferate. There are increasingly affordable software kits on the market to help the public do most of their own basic legal needs, complete with forms and instructions, without the assistance of a lawyer. While some of the publications remind us of the legal profession’s great historical role and noble heritage, they are the few. Most attack the legal profession, lawyers and the law.

On the lower end of the spectrum are the writings of either the disenchanting or disappointed among us who criticize, howl and condemn, but offer nothing of a constructive nature to correct the problems they perceive as existing in the legal profession and the law. Not surprising, there are scores of books currently on the bookstore and library shelves with highly charged titles and condemning contents. Among those titles are *How Lawyers Screw Their Clients*<sup>2</sup>, *Kill All the Lawyers: A Client’s Guide to Hiring, Firing, Using and Suing Lawyers*<sup>3</sup>, and *How Not to Get Screwed by Your Attorney: What You Need to Know to Protect Yourself*.<sup>4</sup> The contents of these books, and many others more like them on the bookshelves, are truly preposterous. Having read literally scores of these types of publications, in my view they bear the same relationship to the legal profession as the National Enquirer does to the Washington Post or the Christian Science Monitor. But these books condemning the legal profession are what the public is buying and reading - and believing.<sup>5</sup>

Skipping from the negative and cynical commercial publications to a higher level of publication, the legal profession doesn't fare much better from the judiciary or respected elements of the news media and legal scholars. For example, one prominent law professor expressed concern over the pressure of hourly billing and observed, "*We're driving out the ethical lawyers.*"<sup>6</sup> A well-known and respected law professor observed, "*the next task facing the legal profession is to make it easier for the ordinary citizen to tell the difference between the honest lawyer and the shyster.*"<sup>7</sup>

From the highest levels of the judiciary come additional comments for concern. Chief Justice William Rehnquist expressed concern over expectations that a lawyer bill more than 2,000 hours per year by noting "*there are bound to be temptations to exaggerate the hours actually put in.*"<sup>8</sup> An appellate court jurist from California noted, "*civil law is becoming an oxymoron.*"<sup>9</sup> Former Chief Justice Warren Burger quipped, "*suing first and asking questions later has become a way of life in the United States.*"<sup>10</sup> Justice Burger also observed that lawyers are the "*living exemplars - and thus teachers - every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best.*"<sup>11</sup>

The June 2002 issue of the Stanford Law Review is of particular interest and is a must read for all corporate and litigation practitioners. A considerable portion of that publication contains a series of scholarly essays by prominent legal scholars reviewing Stanford law professor Deborah L. Rhode's book, *In the Interests of Justice: Reforming*

*the Legal Profession*. One of the authors queries, “*Is there an American legal profession?*”<sup>12</sup> Another asks concerning the future of the legal profession, “*What are its dreams of greatness?*”<sup>13</sup> In her writings, Professor Rhode calls for “*fundamental changes in professional responsibility and regulation,*”<sup>14</sup> and describes the legal profession as being “*a profession permanently in decline.*”<sup>15</sup>

Another scholar describes as “*whitewash*”<sup>16</sup> the advice and counsel Enron received from its lawyers who, in his opinion were “*operating, to put it generously, at the farthest possible boundary of respectable practice.*”<sup>17</sup> In the context of the Enron bankruptcy, this prominent legal educator asks, “*Where were the lawyers?*”<sup>18</sup> A respected scholar took the gloves off when he observed, “*Thus, I agree that many lawyers are greedy, deficient in integrity, overcompensated, preoccupied with the bottom line, excessively zealous, and indifferent to pro bono responsibilities.*”<sup>19</sup> Another prominent academic asked, “*Has our profession abandoned principle for profit, professionalism for commercialism?*”<sup>20</sup>

A prolific writer and professor at one of this nation’s leading law schools observes that many in the profession fail to admit they are part of the problem when they say it is the “*other fella’s fault.*”<sup>21</sup> She continues:

Judges blame lawyers for greed and incivility. Lawyers blame judges for inertia and laxity. Defense counsel blame trial attorneys for frivolous claims and strike suits. Plaintiffs’ lawyers blame opposing counsel for nondisclosure of information and scorched-earth tactics. In fact, there is plenty of blame to go around, and little willingness to support effective structural responses.<sup>22</sup>

Another legal scholar observes:

Similarly, lawyers acknowledge that abuses are widespread in certain areas of practice, such as civil discovery, but invariably they blame someone else. The plaintiffs' bar blames the defense bar; lawyers blame judges for not enforcing them. Corporate lawyers blame the plaintiff's personal injury bar for bringing frivolous claims; plaintiffs blame the defense bar for obstructing just claims. Neither side wants to address the appalling administrative cost of litigation, which keep most claims out of the system completely, or jointly-caused problems such as the collusive settlement of class actions.<sup>23</sup>

Finally, one prominent educator observes, "*Lawyers want it all: high salaries and moral respectability; justice for all and a monopoly on the provision of legal services; public trust and no pesky regulation or public accountability.*"<sup>24</sup>

Considering the source of these statements and evaluations of the current state of the legal profession, it is ironic that so much of the criticism is coming from those currently responsible for teaching the next generation's lawyers. Needless to say, there is a great deal more of a negative nature which could be cited and quoted, but the point is made; judges at the highest levels and legal scholars from some of this nation's most respected law schools are calling for acknowledgment of problems existing in the legal profession and are urging widespread reform in lawyer's conduct and contribution to society, professional responsibility and ethics.

While we are on the subject of legal education, what is the role of the law schools in teaching ethics and professional responsibility? To their credit, the academics candidly acknowledge part of the blame must be placed on the law schools. Recognizing

that law schools have always played a role in shaping professional values, one scholar criticizes those institutions where the curriculum amounts only to one ethics course offering little more than “*general piffle*.”<sup>25</sup> She also criticizes law professors who are value-neutral on matters of value, and those who “*decline to put ethical issues on the educational agenda, . . . suggest that instruction on professional responsibility is someone else’s responsibility. And they encourage future practitioners to do the same.*”<sup>26</sup>

While placing ethical education in a prominent place in the law schools’ educational curriculum and agenda is obviously a good start, I suggest going further. Why not make ethics and professional responsibility an integral part of the curriculum beginning the *first* year of law school and make it a part of *every* course taught?

If Justice Felix Frankfurter was correct when he observed, “*Law and lawyers are what law schools make them,*”<sup>27</sup> the ethical and professional responsibility aspect of legal education must start early. With Frankfurter’s observation in mind, in addition to the professional responsibility class already being taught in the law schools, I suggest that serious consideration be given, even if on a trial basis, commencing in the first year of law school in every course as it is being taught, to weave into the fabric of the class discussion a meaningful dialogue of ethical issues related to the subject. In light of the increasing concerns raised, especially in the academic and scholarly literature, it appears that the ethical aspect of legal education may not be getting through. Perhaps the deans and faculties of our law schools need to reevaluate whether offering only a third year

survey course reviewing the rules of professional responsibility is sufficient. While some courses are obviously more adaptable to integration of ethics with the substance of the materials being taught than others, it would appear to be a highly productive part of legal education to incorporate into class discussions and lectures a meaningful discussion of ethical issues. In that manner, consideration of ethics and professional responsibility would start early, would be given the emphasis needed and deserved. In that manner, those all-important principles would be integrated with the course material being taught, instead of being isolated issues treated separately late in the third year when so many, perhaps those who need to hear it the most, are tuned-out or burnt-out, and focused on finding employment.

So what does all of this mean? After considerable research and careful analysis of the academic literature, and having daily interactions with lawyers from literally all parts of the country, and notwithstanding all of the negative commentary, I am absolutely convinced most lawyers provide a timely, quality legal service to their clients at a fair price. Sure, there are exceptions and there is always room for improvement, especially in pre-trial discovery where unreasonable and abusive practices do regularly occur, and acknowledging some cases are over-lawyered, and there are occasions when zealous advocacy exceeds courtesy and civility, in my well-formed opinion the vast majority of lawyers are honest, competent and fair - and civil - in their dealings with opposing counsel and the court. Rarely do I see anything less than professionalism when lawyers

appear in court or in their written submissions.

Regardless of the area of practice, the lawyer's work is often the difference in preserving the benefit of a lifetime of work and investment - or losing it. Or the legal work with perhaps the greatest responsibility and pressure of all: preventing the conviction and incarceration, or even imposition of the death penalty, of an innocent person charged in the criminal courts.

In the practice of law, the stakes are high. After the client has his or her day in court, there is usually not another day. Rarely is there a second chance once the verdict has been returned and a judgment entered. Lawyers have a weighty responsibility. They are the first line of defense in seeing that mistakes do not occur in the process of their representation of clients regardless of the setting. It has been my observation and experience that the consistently successful lawyers seem to inherently know how, or at least know where to look, to find answers and solutions to protect their clients' interests.

All of us in the legal profession have the same equal opportunity to enjoy the view from the shoulders of the giants who have preceded us. We must not forget what we have inherited and the profound lessons taught to us by the master lawyers of prior generations. Among the giants of the legal profession are some of the founders of this nation, great lawyers of historical significance in the 1860's, the 1950's and the 1960's, even lawyers of our own time who have proven themselves through a lifetime of service to the legal profession. In this process, it is our *clients* who are the ultimate beneficiaries of the

legacy we inherited from the giants who preceded us.

When individuals, families or business entities need legal counsel, or their legal interests are adversely effected, lawyers usually become involved to either prevent problems from the outset, or if legal problems arise, as they frequently seem to do, lawyers are called on to rescue or resuscitate, or put out a fire. When Enron, WorldCom, and other once seemingly invincible companies imploded, it was the actions of just a few, some of whom were lawyers, which led to thousands losing their pensions and retirement security, and millions of investors suffered losses as the stock market spiraled downward in the subsequent free fall.

It is healthy and productive to occasionally remind ourselves that while there are a few bad apples who give the entire profession a black-eye, there are tens of thousands who take the high road, the ethical and professional approach to the practice of law every day. All of us must take those steps necessary to ensure that the traditional values and time-proven standards of the legal profession are being honored and reinforced. But, if we abdicate our responsibility I am convinced that the legal profession as we know it will either be considerably different, or will altogether vanish, by the end of this century. For those of us with children and grandchildren who are practicing law, and for their children who may want to do the same, I would think we would want to leave our present system and the legal profession in good order so they enjoy the same profession which has been so good to us. When each one of us turns the light off and leaves the office for the last

time, we should all have a sense that we left the profession and the practice of law better for our having been part of it.

As urged by their own colleagues, legal educators should start the process early. Law professor Neil Franklin had this concept in mind when he told me, *“First year law students are really part of the legal profession. They are in the process of earning their professional reputations - it starts the first day of law school.”*

Once the legal educators start the process, it is then up to the senior practitioners and the courts to become the finishing schools. The senior members of the profession should teach, reinforce, and enforce where necessary, the highest degree of professional standards of responsibility by example. In addition to the excellent CLE programs offered by the Bar, law schools and various legal organizations, law firms large and small should include presentations on ethics and professional responsibility in their regular training sessions or firm retreats. If a young lawyer is a sole practitioner, he or she should try to find a respected mentor who is willing to share wisdom and insight that comes only with age and experience. Most high quality lawyers are pleased, in fact honored and flattered, to be asked for counsel and advice by a younger member of the Bar. Obviously, routine matters of practice and culture of the local legal community are things one picks up just by practicing law and regularly appearing in court. Participation in the Inns of Court program and local bar membership are helpful venues to learn from older, more experienced lawyers. It has been my observation that if there is a question that is

troubling a young lawyer, and involves a sensitive matter or one of significance, most experienced lawyers are willing to help direct a younger or less experienced member of the Bar. If there are no experienced lawyers available within the Bar that the new member feels comfortable in approaching, there is a remarkable reservoir of wisdom and experience in the growing cadre of retired or senior judges who may be the most willing of all to provide assistance in this regard. Finally, if all else fails, call the State Bar Office and ask to speak to Bar Counsel, who will likewise be willing to provide guidance and direction in a matter of serious concern to the young lawyer.

Perhaps the most succinct ethical advice I have ever read were the words Lincoln wrote to a young lawyer who had come to seek his advice. This wise and trusted mentor counseled, “[i]f, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation . . . .”

Ethical “piffle” should not be acceptable as the standard in law schools or in the practice of law. Educators, senior partners and judicial officers should require the same high standards of ethics and professional responsibility as is expected in competence, preparation and the *work* ethic of those whom they employ. We owe nothing less to the profession we inherited. Let us resolve to strengthen the legal profession during our tenure and leave a legacy sufficient to encourage those who follow us to do the same.

It matters little whether it is during times of adversity or prosperity, lawyers always become involved in representing individuals and companies who are affected by the

events of the times. This is not something new or novel to our time. Beginning with our nation's founding, and later in times of national crisis, lawyers have always risen to the challenge, writing the Declaration of Independence, drafting the United States Constitution, abolishing slavery and preserving the Union, and using the courts and the Rule of Law to first obtain, and then subsequently protect and ensure enforcement of those all important civil rights. As our professional ancestors did during those so terribly important and pivotal times when the very existence of our nation was at stake, we must do nothing less for the legal profession which contributed so mightily at those times. We need to periodically remind ourselves of our noble professional heritage and ask ourselves if we are measuring up. We must stand for something good. If needed, we must change what many, including respected legal scholars, have concluded is an unalterable downward course and create a new paradigm. In the event we are off-course, there is no alternative; we must take steps within the area of our influence to help guide the profession back to those time-tested principles upon which the legal profession is based.

I believe there is at least a partial answer and solution to the variety of problems the critics of the legal profession frequently raise. It is, at least, in my view, a good place to start. Not long ago, Justice Anthony Kennedy urged that all lawyers should strive to adopt "*the simple honesty of Lincoln.*"<sup>28</sup>

Yes, there is good news to report about the legal profession and my evaluation glass is considerably more than half-full. If we who are now the senior members make a

commitment to leave the profession better for our having been a part of it, we will leave a path for those who follow.

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## END NOTES

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3. Sloan Bashinsky, *Kill All the Lawyers?: A Client's Guide to Hiring, Firing, Suing, Using and Suing Lawyers* (1986).
4. Dudley Gray and Arthur Lyons, *How Not to Get Screwed by Your Attorney: What You Need to Know to Protect Yourself* (1996).
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13. Robert W. Gordon, *Portrait of a Profession in Paralysis*, *id.* at 1427.
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23. Robert W. Gordon, *Portrait of a Profession in Paralysis*, id. at 1434.
24. Angela Harris, *Reforming Alone?*, Stanford Law Review, Vol. 54, Number 6, p. 1450.
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26. Deborah L. Rhode, *The Profession and the Public Interest*, Stanford Law Review, Vol. 54, Number 6, p. 1520, 2002.
27. Letter from Felix Frankfurter to Mr. Rosenwald 3 (May 13, 1927), quoted in Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Men and Women Lawyers* 156 (1989).
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